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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 527

JOHN BATISTA CONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 24–28) is reported at 349 F. 2d 304.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1965 (Pet. 28). The petition for a writ of certiorari was filed on September 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction over a charge of wire fraud where, although the scheme

to defraud was consummated in Canada, the telephone and teletype messages transmitted in executing the scheme were sent to and from the district in which the trial court sits.

2. Whether the evidence was sufficient to support the conviction.

3. Whether newspaper coverage which did not reach the jury deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner and co-defendant John Samarin were convicted on six counts of using communication wires in interstate and foreign commerce to execute a scheme to defraud, in violation of 18 U.S.C. 1343 (R.A. 3a–7a),[1] and were given five-year concurrent sentences on each count (R.A. 45a–46a). The court of appeals affirmed.[2]

In essence, petitioner's scheme to defraud was that he and Samarin would sell corporate bonds on which the trustee's signature, necessary for validity, had been forged (R.B. 7b) to Charles Cullinan, a Cleveland businessman (R.A. 16a; Tr. 136; Ex. 3, 4). These bonds, with $60,000 face value, were part of a large group of a Canadian oil company's bearer bonds

[1] "R.A." refers to petitioner's appendix in the court of appeals, and "R.B." refers to the government's appendix in the court of appeals, both of which are on file with this Court. "Tr." refers to the transcript of the trial proceedings which we are lodging with the Clerk.

[2] The appeal of co-defendant Samarin was dismissed on stipulation (Pet. 24).

which mysteriously disappeared from the trustee's vault in Toronto in February 1959 (R.A. 12a–14a).

In July 1962, Samarin told Cullinan that he knew of some Canadian bonds which were for sale at a discount. Shortly after this conversation, Cullinan was given one such bond to show his broker in order to ascertain the current market value (R.B. 11b–13b; Tr. 136; Ex. 3). When Cullinan told Samarin that his broker would be unable to sell the bonds in Cleveland (R.B. 14b), Samarin asked him to make further attempts to find a market (R.B. 15b). Approximately two weeks later, Cullinan told a wealthy Cleveland businessman, Dominic Visconsi, about the possibility of buying Canadian bonds at a discount (R.B. 15b). Visconsi requested a sample of the bonds so that he could show it to his broker, and Cullinan once again obtained from Samarin the bond he had previously been given (R.B. 15b). Upon receiving the bond from Cullinan, Visconsi delivered it to his broker, F. I. DuPont & Co. (R.A. 26a). DuPont sent two teletype messages to their New York office and received a teletype message in reply concerning the marketability of the Canadian bonds (R.B. 42b–43b; Ex. 1B, 1C, 1G; Tr. 279). These wires were the basis for counts two, three, and four of the present indictment. Later, DuPont arranged for the sale of the bonds for $50,000 through an exchange of wires with a Canadian broker (R.A. 9a–10a). These wires were the basis for counts five and six.

On August 9, 1962, petitioner and Samarin checked into the same room at a Toronto hotel (Tr. 231).

The next day, Cullinan telephoned Samarin at his hotel room and told him that he would not be coming to Toronto that day, as Samarin had requested,[3] since a sale of the bonds by Cullinan had not yet been arranged (Tr. 89). This call was the basis of count eight. Four days later, after arrangements for a sale had been made, Cullinan went to Toronto to obtain the bonds from petitioner and Samarin who, once again, were sharing the same hotel room (Tr. 234). On the evening of August 14, while Samarin and Cullinan waited in a hotel room, petitioner went out to make arrangements for the transfer of the bonds (Tr. 112–114, 193–194). On August 15, petitioner brought 120 bonds to his and Samarin's hotel room in two shopping bags (Tr. 104). Cullinan paid petitioner the agreed down payment, $10,000 cash in Canadian money, and took a receipt for that amount from Samarin (Tr. 104–106). Cullinan then delivered the bonds to the Canadian broker through whom DuPont had arranged for their sale. The broker gave Cullinan a check for $49,874, but stopped payment when he learned that the bonds he had received were among those stolen from the trustee in 1959 (R.A. 17a). Cullinan asked Samarin to return his down payment, but the request was not complied with (R.B. 37b).

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[3] Cullinan testified that Samarin had called him from Toronto on August 9 to ask him to come and get the bonds (Tr. 89). This call was the basis of count seven, on which petitioner and Samarin were acquitted.

ARGUMENT

1. Petitioner argues that, since the bonds were sold in Canada, any crime he might have committed was exclusively within Canadian jurisdiction (Pet. 7–13). All of the teletype and telephone messages transmitted in executing petitioner's scheme to defraud, however, were sent to or from Cleveland, Ohio. The gist of the offense charged is the use of interstate and international wire communications in the execution of a scheme to defraud, and there is plainly jurisdiction in the United States to punish use of domestic wire facilities in execution of such a scheme. Cf. *Steele* v. *Bulova Watch Co.*, 344 U.S. 280. Venue is proper in the place of receipt as well as the point of origin of an interstate or foreign wire. *United States* v. *Fassoulis*, 185 F. Supp. 138 (S.D.N.Y.), affirmed, 293 F. 2d 243 (C.A. 2), certiorari denied, 368 U.S. 919.

2. Petitioner's argument (Pet. 12–13) that the court did not obtain jurisdiction as to him because he did not *knowingly* cause the transmittal of the telephone and teletype messages charged in the indictment is merely an attack on the sufficiency of the evidence. There was ample evidence to show that petitioner and Samarin were acting together in the sale of the bonds so that each is responsible for causing the messages in question to be sent (see Statement, *supra*, pp. 3–4). In establishing that defendants caused the use of interstate or international communication wires, it is sufficient to show that such use was a foreseeable consequence of their acts. See *Pereira* v. *United States*, 347 U.S. 1; *United States*

v. *Sheridan,* 329 U.S. 379. In this case, the use of teletype wires between the broker's office in Cleveland and other brokerages was reasonably foreseeable in the sale of $60,000 of Canadian bonds. Moreover, it is clear that the telephone call on August 10 from Cullinan in Cleveland to Samarin's hotel room in Toronto (where petitioner was also staying) was the direct result of petitioner's and Samarin's efforts to have Cullinan come to Toronto to purchase the bonds. Thus, as the court below pointed out (Pet. 28), since count eight was clearly sustained by the evidence and since petitioner received concurrent sentences, the conviction on that count is sufficient to support his sentence. *Lawn* v. *United States,* 355 U.S. 339, 359; *Hirabayashi* v. *United States,* 320 U.S. 81.

Petitioner also argues that the evidence failed to establish his knowledge that the bonds were stolen (Pet. 14–19). But the district court, the jury, and the court of appeals have all ruled on this evidentiary question adversely to petitioner's contention. There is no occasion for this Court to undertake a further review of the evidence. See *Scales* v. *United States,* 367 U.S. 203, 230; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589–590. Admittedly, the evidence on this issue is circumstantial, but the courts have recognized that such issues are "often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances * * *."[4] *Nassan* v. *United States,* 126 F.

[4] Among the relevant circumstances here were the following: Although the bonds were stolen in 1959, all except the one

2d 613, 615 (C.A. 4); see *Delli Paoli* v. *United States*, 352 U.S. 232, 236 n. 4; *Glasser* v. *United States*, 315 U.S. 60, 80.

3. A newspaper article was printed in the Cleveland Press during the course of the trial which made reference to another criminal charge pending against petitioner (R.A. 43a, 45a; Ex. A), and petitioner moved for a mistrial on the basis of this article. In response to this motion, the trial judge questioned each of the jurors individually, while they were together, and determined that no juror had read the article. Juror Madelyn Maier stated that a friend had told her of the article, but not its contents, and asked her whether this was her case (R.A. 34a). She did not reply to her friend's inquiry and told the court that she had not read the article (R.A. 35a).[5] There was no necessity, therefore, for the trial court to

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which had been presented to the various brokers for inspection looked "practically like new paper money" (Tr. 111). Petitioners sold to Cullinan for $45,000; while a reputable broker in the same city at the same time was willing to and did pay $49,874. Although Cullinan asked Samarin to return his down payment shortly after the payment was made, Samarin did not repay the money and apparently gave no indications as to where the money had gone. The manner in which the bonds were transferred from petitioner to Cullinan in Toronto and the ample evidence of petitioner's complicity with Samarin in selling the bonds were also properly considered by the jury.

[5] The relevant portion of the colloquy with the jurors is as follows (R.A. 34a–35a):

"Juror No. 6 (Madelyn E. Maier). * * *

"This morning just before I left, a friend called from out of town, and—she just came from out of town—she said, 'Was

remove Mrs. Maier from the panel or to declare a mistrial.

Petitioner's reliance on *Marshall* v. *United States*, 360 U.S. 310, for the proposition that calling each juror into chambers is the *only* correct method of questioning them, is misplaced. This Court stated in *Marshall* that: "The trial judge has a large discretion in ruling on the issue. * * * [E]ach case must turn on its special facts" (360 U.S. at 312). In *Marshall* the trial judge had learned that articles had *reached* the jury and was trying to ascertain the effect of

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that your case written up in the paper?' And I didn't answer.

"She said, 'I know you're not supposed to talk about it,' but she said seeing something in the paper about a case.

"(381) And I said, 'Frankly, I haven't read the papers, I have been so busy.'

"And that's all that was said.

"So I came in and I said to Mrs. Szabo, 'Did you see anything written up in the paper?'

"And nobody had seen anything. That was all.

"The COURT. You talked to the jury generally and asked them?

"Mrs. MADELYN E. MAIER. I said this morning, when I came in, to Mrs. Szabo.

"The COURT. Did you mention this to anybody else besides Mrs. Szabo?

"Mrs. MADELYN E. MAIER. No, that's all. I said it at the table.

"The COURT. You said it at the table, and none of the jurors spoke up and said they had seen the article?

"Mrs. MADELYN E. MAIER. Whoever heard me—I know she was there, but I don't know who else.

"Mrs. VIOLET J. SZABO. All the ladies were there.

"Mrs. MADELYN E. MAIER. But nobody had read it.

"The COURT. No one had read it?

"Mrs. MADELYN E. MAIER. No. In fact, I didn't even know what it was all about.

"That was the conversation."

the articles upon each juror. Here, the judge was determining whether the articles reached the jury at all. When it became apparent that none had read the article, it was unnecessary to proceed further. It should be noted that the trial judge carefully told the jury before he questioned them that it would not be their fault if they had read the article, and that they should not be afraid to answer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1965.

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